

IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH

NO. 4313

NORFOLK COUNTY

COMMONWEALTH
OF
MASSACHUSETTS

v.

[REDACTED]

[REDACTED]

Appellants

Brief of the
Massachusetts Association of School Committees, Inc.
As Amicus Curiae

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I. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The issue presented by the amicus for review is whether certain provisions of G.L. c.76, §1 violate the Massachusetts or the United States Constitution, the challenged provisions being those which require that every child, with certain exceptions not material to the case at bar, between certain ages shall attend a public or other day school approved by the school committee of the town in which the child resides but that such attendance shall not be required of a child "who is being otherwise instructed in a manner approved in advance by the superintendent or the school committee of said town."

SECTION TWO "STATEMENT OF THE CASE" REDACTED

SECTION TWO, "STATEMENT OF THE CASE" REDACTED

III. SUMMARY OF THE ARGUMENT.

Massachusetts requires (G.L. c.76, §1) that children between certain ages shall, with certain exceptions, attend a school for the number of days required by the Massachusetts Board of Education but that such attendance shall not be required "of a child who is being otherwise instructed in a manner approved in advance by the superintendent or the school committee (of the town in which the child resides)." This requirement that children be educated has existed in Massachusetts from earliest colonial times and is stated in the Massachusetts Constitution. The validity of the Massachusetts statute has been twice affirmed by

the Supreme Judicial Court, in one case against the claim that public school attendance conflicted with the religious beliefs of parents of the child in question.

In the case at bar the parents of elementary age children assert the right, based on their religious beliefs, to educate their children at home without approval by the local school committee or superintendent. Under the facts of the case at bar, the interest of Massachusetts in minimal education of its children to permit them to be responsible members of a democratic society in a largely urban but diversified economy is sufficiently compelling to impose upon the religious beliefs of the [REDACTED] parents the modest burden that they provide the local school authorities information regarding their proposed program of instruction for their children so that these authorities will have a basis for approving it as including a reasonable equivalent of the basic education which Massachusetts expects its children to receive, and that, absent such approval, they enroll their children in a school.

Accordingly the Massachusetts statute does not impose an unconstitutional burden upon individual rights to religious freedom protected by the Massachusetts or the United States Constitution.

Tested by the standards set forth by the Supreme Judicial Court and by the Supreme Court and other courts of the United States, the Massachusetts statute, G.L. c.76, §1, is not unconstitutionally vague and does not represent an unlawful delegation of legislative power. When read in the context of the body of Massachusetts statutes providing for and regulating public education, G.L. c.76, §1 relieves persons of common intelligence of the necessity to guess at its meaning and differ at its application. Similarly, the statute contains adequate standards for its application by local school authorities so as to constitute a lawful delegation of legislative power.

While other issues are raised by the appellants in this case, the amicus does not address those issues in this brief.

IV. ARGUMENT

- A. THE MASSACHUSETTS STATUTE, G.L. c.76, §1, COMPELLING CHILDREN TO ATTEND PUBLIC OR ACCREDITED SCHOOLS OR RECEIVE EDUCATION APPROVED BY PUBLIC SCHOOL AUTHORITIES, DOES NOT VIOLATE EITHER THE MASSACHUSETTS OR THE UNITED STATES CONSTITUTIONS.

Assuming that the position of the [REDACTED] parents in this case rests upon their religious

beliefs and not upon a general view that their children can be better educated at home by one or both of them than in school, the [REDACTED] parents squarely challenge the right of the Commonwealth to require that the home education program they propose be approved in advance by the local school authorities. They decline to furnish the school authorities with information on which the authorities can approve or disapprove and assert a constitutional right so to refuse.

Massachusetts requires that children resident in the Commonwealth be educated. The statute, G.L. c.76, §1, imposing this requirement, provides in relevant part:

"Every child between the minimum and maximum ages established for school attendance by the board of education, except [certain categories of children] shall . . . attend a public day school in [the] town [where the child resides] or some other day school approved by the school committee, during the number of days required by the board of education in each school year, unless the child attends school in another town, for said number of days . . . but such attendance shall not be required . . . of a child who is being otherwise instructed in a manner approved in advance by the superintendent or school committee . . . For the purposes of this section, school committees shall approve a private school when satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public

schools in the same town; but shall not withhold such approval on account of religious teaching

"The school committee of each town shall provide for and enforce the school attendance of all children actually residing therein in accordance herewith." (emphasis supplied).

The statute obliges parents and others in control of children to cause school attendance in compliance with §1:

"Every person in control of a child described in the preceding section shall cause him to attend school as therein required, and, if he fails so to do for seven day sessions or fourteen half day sessions within any period of six months, he shall, on complaint by a supervisor of attendance, be punished by a fine of not more than twenty dollars"

G.L. c.76, §2.

(The amicus notes that the court below "summarily" dismissed the criminal charges against the [REDACTED] parents under G.L. c.76, §2. (Transcript, Exhibit XXV, p.2).

As the Supreme Judicial Court made clear in Jenkins v. Andover, 103 Mass. 94 (1869), from the beginning of its history Massachusetts has emphasized both the crucial importance of the education of children and the central role of individual municipalities in providing and controlling such education:

"The founders of the colony appreciated the importance and necessity of providing

for the universal education of the people, at a very early period; and, to make it secure, they felt the necessity of placing it under the control of the people in each municipality. Accordingly the colonial act of 1647 required each town containing fifty householders to maintain a school in which the children should be taught to read and write; and each town containing one hundred householders to set up a grammar school, with a master able to instruct youth so far that they might be fitted for the university. The teachers were to be paid, 'either by the parents or masters of the children, or by the inhabitants in general by way of supply, as the major part of those that order the prudentials of the town shall appoint.' Anc. Chart. 186. Thus they laid the foundation of a system of common schools, which has been modified and improved from time to time, but has always retained its fundamental character and purpose. It provided free education in the elementary branches of learning to the children of every town, in schools to be managed and controlled by the authorities of the town, and supported by taxation of the inhabitants, unless sufficient contributions are received from other sources; and in the larger towns, which are sufficiently populous to make it desirable and reasonable, similar schools are to be maintained for the education of the more advanced pupils in higher branches of learning. (emphasis supplied).

103 Mass. at 96-97.

The Massachusetts Constitution stresses the necessity for general education:

"Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different order of the people,

it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially . . . public schools and grammar schools in the towns; . . . to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people."

Mass. Const. Pt.2, C.5, §2.

This section is solemn testimony to the importance of public schools and grammar schools "in maintaining a system of popular government which shall secure not only peace and order, but individual freedom and elevation of character."

Jenkins v. Andover, 103 Mass. 94, 97 (1869).

On the two occasions where the Supreme Judicial Court has considered appeals against the enforcement of G.L. c.76, §1 or a predecessor statute, the Court has affirmed the statute.

Commonwealth v. Roberts, 159 Mass 372 (1893);

Commonwealth v. Renfrew, 332 Mass 492 (1955).

In Roberts the Court set aside the conviction of a parent charged with failing to cause his child to attend public schools because the trial court had excluded evidence offered by the defendant that the child in question had attended a private school which provided instruction in the

branches of learning required to be taught in public schools. The school committee had refused approval of the private school in question. The penalty imposed for violation of the statute under which the complaint was filed (St. 1890, c. 384) was not incurred if the child had "been otherwise 'instructed . . . in the branches of learning required to be taught in the public schools.'" In its opinion the Court said

"The great object of these provisions of the statutes has been that all the children shall be educated, not that they shall be educated in any particular way."

159 Mass. at 374.

The Court also observed that the statute did not limit a parent to a school approved by the school committee, although sending a child to such a school "is enough to comply with the requirement of the law, without further inquiry", 159 Mass. at 374, but that a parent sending a child to a non-approved school had the burden of proving that the child was sufficiently and properly instructed.

In Commonwealth v. Renfrew, the defendant parents, Buddhists, taught their child at home in part because some of the things he was being taught in the public schools were in conflict with the principles of Buddhism. The Court sustained convictions under G.L. c.76, §2 for failing to

cause the child to attend school as required by G.L. c.76, §1. The Court said:

"Home education of their child by the defendants without the prior approval of the superintendent or the committee did not show a compliance with the statute and bar the prosecution of the defendants. (citations omitted) The right to religious freedom is not absolute"

332 Mass. at 494.

G.L. c.76, §1 explicitly excludes religious teaching from the school committee's consideration: ". . . school committees shall approve a private school when satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein that in the public schools in the same town; but shall not withhold such approval on account of religious teaching." (emphasis supplied)

The Supreme Judicial Court has also held that a parent's religious beliefs do not excuse compliance with a statutory requirement that school children be vaccinated. Commonwealth v. Green, 268 Mass. 585 (1929).

(In a later case, Commonwealth v. Childs, 299 Mass. 367 (1938), the Supreme Judicial Court sustained the vaccination statute (now G.L. c.76, §15) against a claim of unconstitutional vagueness; the then statute was amended by St.

1967, c.590 to waive the requirement for a vaccination certificate where vaccination or immunization conflicted with religious beliefs).

Thus the settled law in Massachusetts is that the interest of the Commonwealth, expressed in the Constitution, in the education of its people is enforceable against claims of religious belief. The consistent statutory pattern of enforcement by local authorities of the Commonwealth's interest is valid, the interest being "that all the children shall be educated, not that they shall be educated in any particular way." Commonwealth v. Roberts, 159 Mass. 372, 374 (1893).

This settled law takes into account Article II of the Declaration of Rights:

"And no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; . . . "

and Section 1, of Article XVIII of the Amendments to the Massachusetts Constitution:

"No law shall be passed prohibiting the free exercise of religion."

Whether G.L. c.76, §1 violates either of these provisions of the Massachusetts Constitution or the Free Exercise Clause of the First Amendment to the United States Constitution--"Congress shall

make no law . . . prohibiting the free exercise (of religion)," made applicable to the states by the Fourteenth Amendment--is determined by applying a three-part test to decide "(a) whether the exercise interfered with is motivated by and rooted in a legitimate and sincerely held religious belief; (b) whether and to what extent the regulation burdens the exercise; and (c) whether any such burden is justified by a sufficiently compelling state interest." Braintree Baptist Temple v. Holbrook Public Schools, 616 F. Supp. 81, 90 (D. Mass. 1984), citing Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972).

In Yoder the Supreme Court of the United States affirmed the power of a state to regulate basic education and the necessity in a democratic society that its citizenry be educated. The Court said

"There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education,"

406 U.S. at 213, and stated its acceptance of the propositions that

". . . as Thomas Jefferson pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education pre-

pare individuals to be self-reliant and self-sufficient participants in society."

406 U.S. at 221.

Of the three parts of the Yoder test, the third, whether there is a sufficiently compelling state interest, is fully met by the Massachusetts interest in public education described above. The first part of that test, the basis of a legitimate and sincerely held religious belief on the part of the ████████ parents, appears to be met by the findings of the District Court in paragraphs (22) and (25) of the Settled Report:

"Both parents have . . . strong religious convictions and . . . their convictions include the fact that they are responsible before God for the education of their children"

"(The parents) have very strong reservations about the various influences that the public school and its environment would exert on their children if they were to attend. These influences are in conflict with the training and upbringing based upon Biblical principles that they as parents are trying to provide for their children"

There remains the question whether G.L. c.76, §1 burdens the exercise by the ████████ parents of the exercise of their religion and, if so, whether the state interest is sufficiently compelling to justify the burden.

In Yoder, Wisconsin sought to enforce its compulsory school-attendance law, requiring atten-

dance until age 16, against members of the Amish faith who declined to send their children to public school after they completed the eighth grade. After enunciating the state's interest in education, the Court observed that "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests," 406 U.S. at 215, and examined at length the history of the Amish society, the strength of its religious beliefs and the importance to that society and those beliefs of having Amish children in the Amish community after the eighth grade. 406 U.S. at 216-227. The Court cited the three century history of the Amish as an identifiable religious sect, their long history as a successful and self-sufficient segment of American society, the adequacy of their alternative mode of continuing informal vocational education, "a convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept," 406 U.S. at 236, the Court held the application of the Wisconsin statute to post-eighth grade Amish children to violate the First and Fourteenth Amendments.

In contrast, under the Massachusetts statute the [REDACTED] parents need only obtain advance approval of their home education program for their children, all of whom are of elementary school age, and the [REDACTED] parents assert a constitutional right not even to furnish information on the basis of which approval might be given.

The Supreme Court of the United States has also limited the power of a state to compel education in instances where the compulsion violates the Fourteenth Amendment. In Pierce v. Society of Sisters, 268 U.S. 510 (1924), the Court struck down an Oregon statute construed as compelling education to be conducted in public schools. Both religiously-oriented and secular private schools complained. Although the Court held the statute to offend the Constitution because it infringed upon the liberty of parents to direct the education of their children, 268 U.S. at 534, the Court affirmed the right of a state reasonably to regulate schools:

"No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be

taught which is manifestly inimical to the public welfare."

268 U.S. at 510.

In Farrington v. Tokushige, 273 U.S. 284 (1927), the Supreme Court of the United States struck down an act of the Hawaiian territorial legislature which sought to regulate foreign language schools as violating the Fifth Amendment's prohibition against deprivation of liberty or property without due process. As in Pierce, the Court viewed the statute as an unreasonable restriction upon the right of a parent to direct the education of the parent's child. As in Pierce, the Court considered that enforcement of the statute would probably destroy many of the schools affected.

Thus the Supreme Court of the United States has, on the one hand, recognized the fundamental interest of the states in the education of the children residing in them and the consequent right of the states to regulate education, particularly basic education, within reasonable limits and, on the other hand, has sustained the personal rights of individuals guaranteed by the United States Constitution against unreasonable infringement in the name of state regulation of education.

Where, however, as here, the issue is home education, several courts have held that the narrow holding in Wisconsin v. Yoder, 406 U.S. 205 (1972) does not apply. See Fellowship Baptist Church v. Benton, 620 F. Supp. 308 (S.D. Iowa 1985); Duro v. District Attorney, Second Judicial Dist., 712 F.2d 96, (4th Cir. 1983), cert. denied, 465 U.S. 1006 (1984); State v. Riddle, 285 S.E.2d 359 (W. Va 1981).

In State v. Riddle, parents were convicted of failing to comply with a West Virginia Compulsory School Attendance Law. The parents were "'Biblical Christians' who belong to a Methodist sect, the Wesley." 285 S.E.2d at 361. The parents used home instruction rather than send their children to school. The court in Riddle distinguished the Yoder case based on 1) the younger age of the children, and 2) the lack of a religion with the history and characteristics of the Amish. The court in Riddle held that the compulsory education statute requiring the qualification of home instructors by the county superintendent and county board of education did not violate the First Amendment. The court concluded with a strong statement regarding the danger of unregulated home instruction:

"While the appellants in the case before us are sincere, dedicated, and competent parents, the principle which they are urging, namely the legitimacy of ad hoc non-compliance with our school attendance laws, leads ineluctably to a hideous result. If we were to accept their reasoning, our holding would imply that parents have the right to keep their children in medieval ignorance, quarter them in Dickensian squalor beyond the reach of the ameliorating influence of the social welfare agencies, and so to separate their children from organized society in an environment of indoctrination and deprivation that the children become mindless automatons incapable of coping with life outside of their own families. We hold that the first and fourteenth amendments to the Constitution of the United States do not contemplate such a result."

285 S.E. 2d at 367.

The Massachusetts statute (G.L. c.76, §1) neither deprives any parent or child of liberty or property nor interferes with the free exercise of religion. The Massachusetts statute properly and reasonably provides for minimal regulation in the public interest of the education children receive without regard to the method - public school, private school or home - by which they receive it. Judged by the balancing test applied in Prince v. Massachusetts, 321 U.S. 158 (1944), as well as, in differing contexts, in Griswold v. Connecticut, 381 U.S. 479 (1965), and in Roe v. Wade, 410 U.S. 113 (1973), the Massachusetts statute emerges as a compulsion based upon a fundamental interest of

the state which is not enforced in a manner which invades any constitutionally protected right of privacy, or unreasonably infringes upon any individual's rights or freedoms guaranteed by the United States or by the Massachusetts constitutions.

In the case of the █████ children all that the Massachusetts statute requires is that the program for their home education be presented for approval to the superintendent or the school committee, the local authorities which the Commonwealth has charged with protection of its interest in education. The level of education involved for the █████ children, who range in age from █████ downward, is basic, not a disputable fringe of two upper grades as in Yoder; the Massachusetts statute does not deny the █████ parents the opportunity to seek private education for their children; the statute expressly excludes any religious condition upon their freedom of choice.

There is nothing in the record in this case which suggests that the enforcement against the █████ parents of their statutory obligation to obtain advance approval of their home education program will involve the Canton school authorities

in any excessive entanglement with the education of the ████████ children. Unless local school authorities may be satisfied as to the scope of the subject matter being taught in a home program and the effectiveness of the teaching, Massachusetts' right to see that all of its citizens shall be educated becomes an illusory right. The enforcement of this right is, by the words of G.L. c.76, §1, not to be affected by the inclusion or exclusion of religious teaching in or from the home program. The citizens of Massachusetts, if they are to be able to exercise responsibly their rights as members of a free society, must receive an education which equips them to communicate, to understand and to make judgments. Massachusetts has the undoubted right to assure minimum education to this end for all of its citizens. The exercise of that right is delegated to the locally elected authorities to which the conduct of publicly-funded education is delegated by G.L. c.71.

Though the compelling interest which Massachusetts has in the education of its children must in some circumstances be subordinated to the free exercise of religion, it should not be subordinated in circumstances where there is no

assurance that children have been or will be taught basic skills and basic knowledge of subjects necessary to enable them to function in and contribute as citizens to a free government and a highly technological society.

B. G.L. c.76, §1 DOES NOT UNCONSTITUTIONALLY DELEGATE POWER TO SCHOOL COMMITTEES AND IS NOT UNCONSTITUTIONALLY VAGUE.

The appellants also claim that the provisions of G.L. c.76, §1 requiring children not attending a public or an approved private school to be "otherwise instructed in a manner approved by the superintendent or the school committee" (hereinafter the "alternative instruction clause") unconstitutionally delegates power to school committees and is unconstitutionally vague. Such claims, however, are untenable in light both of the history and the Constitution of the Commonwealth and previous decisions of the Supreme Judicial Court upholding the alternative instruction clause and of the tests of unconstitutional delegation and vagueness enunciated by the Court and by the Supreme Court of the United States.

Since colonial times education in Massachusetts has been "under the control of the people in each municipality," Jenkins v. Andover,

103 Mass. at 97, and this control has been exercised by local boards elected directly by the people of the respective municipalities. As the Supreme Judicial Court stated in Leonard v. School Committee of Springfield, 241 Mass. 325 (1922),

"It was said in 1846 by Chief Justice Shaw in Cushing v. Newburyport, 10 Met. 508, at page 511: 'The establishment of schools for the education, to some extent at least, of all the children of the whole people, is not the result of any recent enactment; it is not the growth even of our present constitutional government, or the provincial government which preceded it, but extends back two hundred years, to the early settlement of the colony. Indeed, the establishment of popular schools is understood to have been one of the objects for which powers were conferred on certain associations of persons living together in townships, enabling them to regulate and manage certain prudential concerns in which they had a common interest.' The policy of the Commonwealth from early times has been to establish a board elected directly by the people separate from other governing boards of the several municipalities and to place the control of the public schools within the jurisdiction of that body unhampered as to details of administration and not subject to review by any other board or tribunal as to acts performed in good faith." (emphasis supplied).

241 Mass. at 328-329.

And as the Court further pointed out, the powers of school committees are broad and far reaching and have been upheld in many cases:

"The school committee may make all reasonable rules and regulations for the government, discipline and management of

the schools under their charge. This includes a determination within the bounds set by the statutes of the subjects to be taught and the nature of the schools to be maintained and the exercise of discrimination, insight and wisdom in the election of teachers and in the general supervision of the school system, with all the incidental powers essential to the discharge of their main functions. Batchelder v. Salem, 4 Cush. 599. Spiller v. Woburn, 12 Allen, 127. Charlestown v. Gardner, 98 Mass. 587. Kimball v. Salem, 111 Mass. 87. McKenna v. Kimball, 145 Mass. 555. Morrison v. Lawrence, 181 Mass. 127. Morse v. Ashley, 193 Mass. 294. Hammond v. Hyde Park, 195 Mass. 29. Barnard v. Shelburne, 216 Mass. 19. Whittaker v. Salem, 216 Mass. 483. See Day v. Greenfield, 234 Mass. 31.

"The statutory provisions under which these decisions were rendered have been substantially the same for a long time. They have been re-enacted without change in successive revisions of the laws."

241 Mass. at 330.

As noted supra, in Commonwealth v. Renfrew the Court upheld the convictions of the defendant parents under G.L. c.76, §2 for the reason, among others, that "[h]ome education of their child by the defendants without the prior approval of the superintendent or the committee did not show a compliance with the statute [the alternative instruction clause] and bar the prosecution of the complaints." 332 Mass. at 494. Though the opinion did not discuss delegation and vagueness, the Court, by sustaining the convictions of the par-

ents on the basis of the alternative instruction clause, implicitly held the clause to be constitutional and therefore to be neither an unconstitutional delegation of power nor unconstitutionally vague.

In accordance with the Court's analysis of the history and power of school Committees, the Attorney General of the Commonwealth has stated that "the school attendance laws constitute an important part of a statutory scheme designed to implement and effectuate the principles enunciated in Part 2, Chapter 5, Section 2 of the [Massachusetts] Constitution"--the provision which declares it to be

"the duty of legislatures and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the Sciences, and all seminaries of them; especially . . . public schools and grammar schools in the towns"

"Chapters 76 and 77 [of the General Laws] are designed," the Attorney General continued, "to assure that this aspiration be realized." Opinion of the Attorney General, February 10, 1964, Report of the Attorney General for the Year Ending June 30, 1964, p. 184. Expanding on these statements, the Attorney General further declared that

"the Legislature ha[s] vested in the school committee the basic responsibility for formulating and executing policies for the enforcement of the school attendance laws. G.L. c.76, §1. The Committee is the agency with the flexibility necessary for the task; and it is the agency with continuing responsibility for the conduct of all phases of the school system."

Opinion of the Attorney General, February 19, 1964, Report of the Attorney General for the Year Ending June 30, 1964, p. 191.

In short, the powers of school committees, including their powers in regard to school attendance and the approval of private schools and educational programs for children who attend neither a public nor an approved private school, are grounded in the history and the Constitution of the Commonwealth, have been upheld by the Supreme Judicial Court and have received the approval of the Attorney General.

Nor is G. L. c.76, §1 an unconstitutional delegation of power or unconstitutionally vague under the applicable tests enunciated by the Supreme Judicial Court. As the Court has noted, the "'consitutional claims of 'void for vagueness' and unlawful delegation of legislative authority are closely related. The principal question posed by both claims is whether the statute is so vague 'that men of common intelligence must necessarily

guess at its meaning and differ as to its application.' Commonwealth v. Carpenter, 325 Mass. 519, 521 [1950]. O'Connell v. Brockton Bd. of Appeals, 344 Mass. 208, 212 [1962].'" Town of Warren v. Hazardous Waste Facility Site Council, 392 Mass. 107, 123-124 (1984), quoting Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 363 (1973).

The Supreme Judicial Court has repeatedly stated that "the intention of the General Court in enacting any statute must be ascertained, not alone from the literal meaning of its words, but from a view of the whole system of which it is a part, and in light of the common law and previous statutes." Pereira v. New England LNG Co., Inc., 364 Mass. 109, 115 (1973), quoting Armburg v. Boston & Maine R.R., 276 Mass. 418, 426; cf. Registrar of Motor Vehicles v. Board of Appeals on Motor Vehicle Liability Policies and Bonds, 382 Mass. 580, 586-587 (1981). Thus the Court considers statutes in question in a case "not in isolation but in relation to each other and to other statutes, resorting to their origins, their historic development, and their present language." Pereira v. New England LNG Co., Inc., 364 Mass. at 115. As the Court said in Davis v.

School Committee of Somerville, 307 Mass. 354, 361 (1940), "in construing the language of the statute in question consideration must be given to the general body of statutory law relating to the same subject, Armburg v. Boston & Maine Railroad, 276 Mass. 418, 426, and where practicable its language should be construed in harmony with previous statutes dealing with the same matters. Walsh v. Commissioners of Civil Service, 300 Mass. 244, 246."

Indeed, in Town of Warren v. Hazardous Waste Facility Site Safety Council, 392 Mass. 107 (1984), the Supreme Judicial Court rejected a vagueness and unlawful delegation challenge to the Massachusetts Waste Facility Siting Act (St. 1980, c.508, §8), which resembles the alternative instruction clause in that it contains no express standards to guide the body charged with making a determination required by the act, namely a determination of the feasibility of proposed hazardous waste facilities. Though acknowledging the absence of express standards, the Court stated that the requisite standards

"may nevertheless be found in the statute's 'necessary implications. The purpose, to a substantial degree, sets the standards. A detailed specification of standards is not required. The Legislature may delegate to a board or

officer the working out of the details of a policy adopted by the Legislature.'"

392 Mass. at 124, quoting Massachusetts Bay Transp. Auth. v. Boston Safe Deposit and Trust Co., 348 Mass. 538, 544 (1965). "It is apparent," the Court further wrote,

"from the nature of the information that is required to be included with the notice of intent filed with the council, and from the clear purpose of the statute, what considerations should guide the council in making its determination of feasibility and worthiness of State assistance. By making that determination the council does not make laws but rather implements the policies of the Legislature." See Commonwealth v. Diaz, 326 Mass. 525-527 (1950).

392 Mass. at 124.

G.L. c.76, §1, in which the alternative instruction clause appears, deals with school attendance generally and contains specific standards by which school committees are to approve private schools:

"For the purposes of this section, school committees shall approve a private school when satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town; but shall not withhold such approval on account of religious teaching"

The United States District Court for the District of Massachusetts has explicitly held that these standards are not unconstitutionally vague and

overbroad. Braintree Baptist Temple v. Holbrook Public Schools, 616 F. Supp. 81, 91 (D. Mass. 1984). By the principles of statutory construction enunciated by the Supreme Judicial Court, the legislature clearly intended approvals under the alternative instruction clause to be governed by standards substantially similar to those applicable to the approval of private schools--including the requirement that approval not be withheld on account of religious teaching.

G.L. c.76, §1, moreover, is part of a wide-ranging body of statutes that deal comprehensively with education in the Commonwealth, including c.76 itself (which pertains to attendance), c.71 (which pertains, inter alia, to the establishment and maintenance of public schools and the powers and duties of school committees and prescribes subjects to be taught in the public schools), c.15 (which, inter alia, establishes and sets forth the duties of the Board of Education) and c.71B (which provides for the education of children with special needs). This body of law provides substantial additional guidance respecting the standards to be applied in granting approvals under the alternative instruction clause. G.L. c.71, §1, for example, provides in part that public schools

"shall be taught by teachers of competent ability and good morals, and shall give instruction and training in orthography, reading, writing, the English language and grammar, geography, arithmetic, drawing, music, the history and constitution of the United States, the duties of citizenship, health education, physical education and good behavior."

G.L. c.71, §2 provides in part that American history and civics, including the Constitution of the United States, the Declaration of Independence and the Bill of Rights shall be taught as required subjects in all high schools, and G.L. c.71, §3 provides that "physical education shall be taught as a required subject in all grades for all students in the public schools for the purpose of promoting the well-being of such students.

Indeed, in Perchemlides v. Frizzle, Civil No. 16841 (Hampshire Superior Court, November 13, 1978) the Hampshire Superior Court laid down standards and procedures for approvals under the alternative instruction clause by construing the clause in accordance with the principles of statutory construction enunciated by the Supreme Judicial Court. By a Memorandum dated January 4, 1980 (Exhibit IX) the General Counsel to the Department of Education provided to superintendents and school committee chairmen the standards and guidelines set forth in Perchemlides. Taken

together, the standards for approval of private schools set forth in G.L. c. 76, §1 itself, the provisions of G.L. c.71, §1 prescribing subjects required to be taught in public schools and other cited provisions of the General Laws dealing with education clearly indicate, by the principles of statutory construction employed by the Supreme Judicial Court, the intention of the legislature respecting the criteria to be applied by a superintendent or a school committee in approving educational plans under the alternative instruction clause. Construed in light of this intention, the alternative instruction clause is not unconstitutionally vague.

These considerations are also fatal to the apparent claim of the [REDACTED] parents that the alternative education clause is unconstitutionally vague on its face. (See Brief of Appellants, pp.12-13). The alternative instruction clause is not unconstitutionally vague under any of the tests for facial vagueness enunciated by the Supreme Court of the United States. See Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-499 (1982).

For reasons already cited in this Brief, the alternative instruction clause does not on its

face substantially affect a significant amount of constitutionally protected conduct. G.L. c.76, §1, including the alternative instruction clause, deals with education, not religion, and as noted supra, the Supreme Judicial Court has held that the "great object" of the Massachusetts attendance statutes is "that all children shall be educated, not that they shall be educated in any particular way." Commonwealth v. Roberts, 159 Mass. at 374.

Indeed, if, as suggested above, the alternative instruction clause is interpreted in accordance with the principles of statutory construction enunciated by the Supreme Judicial Court, educational programs for children not attending public or an approved non-public school will be approved by the standards set forth in G.L. c.76, §1 for the approval of non-public school and on the basis of other provisions of the General Laws prescribing subjects required to be taught in the public schools. The United States District Court for the District of Massachusetts has held that the standards for approval of private school set forth in G.L. c.76, §1 are not unconstitutionally vague and overbroad and has stated that "the statute on its face does not reach a substantial amount of constitutionally

protected conduct." Braintree Baptist Temple v. Holbrook Public Schools, 616 F. Supp. at 91. In fact, these standards applied to the alternative instruction clause prohibit a superintendent and a school committee from withholding approval under the alternative instruction clause "on account of religious teaching." G.L. c.76, §1. So construed, the alternative instruction clause in no way places any limit or restraint on religious teaching, or infringes any other fundamental right of the ████████ parents. It merely enables the state to further its substantial interest in education by assuring that all students receive instruction in basic subjects and basic intellectual skills as set forth by the legislature. The Supreme Court of the United States has "repeatedly stressed that while parents have a constitutional right to send their children to private school and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation." Runyon v. McCrary, 427 U.S. 160, 178 (1976). Similarly, parents should have no constitutional right to provide their children with education at home

unfettered by reasonable government regulation.

Justice White made the point eloquently in

Wisconsin v. Yoder:

"As recently as last Term, the Court re-emphasized the legitimacy of the State's concern for enforcing minimal educational standards, Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). [Footnote omitted]. Pierce v. Society of Sisters, 268 U.S. 510 (1925) lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society; in Pierce, both the parochial and the military schools were in compliance with all the educational standards that the State had set, and the Court held simply that while a State may posit such standards, it may not pre-empt the educational process by requiring children to attend public schools."

406 U.S. at 239 (White, J. concurring)

In sum, the alternative instruction clause, construed in accordance with the principles of statutory construction applied in Massachusetts, contains ample standards for the approval of educational programs, does not affect a substantial amount of constitutionally protected conduct, including the right of free exercise of religion and the limited right of parents to educate their children by means other than attendance at public schools or approved private schools, prohibits denial of approval on account of religious teaching, and fosters the substantial interest of the

state in educating its children in the basic subjects and the basic intellectual skills prescribed by the legislature in accordance with the mandate of the Massachusetts Constitution. For these and other reasons set forth in this Brief, the alternative instruction clause is not an unconstitutional delegation of power, is not unconstitutionally vague and does not in any other way violate either the United States or the Massachusetts Constitution.

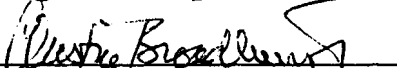
C. OTHER ISSUES

The amicus does not brief the procedural issues raised by the appellants. They are met by the brief for the Canton School Committee. The amicus notes that the appellants did not raise their procedural issues in the court below. As to the standing of the Canton school committee, the amicus adopts the arguments in the brief for the School Committee and emphasizes the mandate of G.L. c.76, §1 that "[t]he school committee of each town shall provide for and enforce the school attendance of all children actually residing therein in accordance herewith."

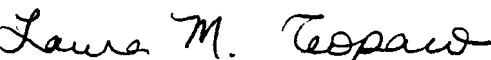
IV. CONCLUSION

Wherefore, for the reasons given, the amicus submits that the provisions of G.L. c.76, §1 are applicable to the [REDACTED] children, are valid and have not been observed by the [REDACTED] parents and that the order of the District Court should be affirmed and ordered to be enforced forthwith.

Respectfully submitted,


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